Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

THE STATE-RECORD CO., INC.,

Petitioner,

v.

B. J. QUATTLEBAUM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTION PRESENTED

Is it a violation of the free press rights secured by the First and Fourteenth Amendments to the United States Constitution and this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), to impose a prior restraint on publication when there is no evidence in the record to support a finding and no specific finding that measures alternative to prior restraint would fail to protect a criminal defendant's right to a fair trial?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the proceedings in the court below are contained in the caption of this Petition; however, The Supreme Court of South Carolina ordered A. Camden Lewis, as attorney for the Court of General Sessions in a related proceeding, to participate fully as if that court were a respondent in the appeal.

The petitioner, The State-Record Co., Inc., is a wholly owned subsidiary of Knight-Ridder, Inc. It has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The State-Record Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of The Supreme Court of South Carolina entered in this case on August 31, 1998.

OPINIONS AND ORDERS BELOW

The opinion of The Supreme Court of South Carolina is reported as *Ex Parte The State Record Co., Inc. v. In Re State of South Carolina vs. B.J Quattlebaum*, 504 S.E. 2d 592 (S.C. 1998), and is reprinted in the Appendix hereto, pp. App. 1-33, *infra*. The Order of The Supreme Court of South Carolina denying Rehearing is not reported and is reprinted in the Appendix hereto, p. App. 43, *infra*.

The *ex parte* order entered by the trial court on August 18, 1997 is not reported and is reprinted in the Appendix hereto, pp. App. 34-36, *infra*.

The August 19, 1997 Order of the trial court extending the August 18, 1997 prior restraint was an oral order. The transcript of the oral order is reprinted in the Appendix hereto, pp. App. 37-42, *infra*.

JURISDICTION

The judgment of The Supreme Court of South Carolina affirming the imposition of a prior restraint entered by the Court of General Sessions for the Eleventh Judicial Circuit of South Carolina was entered on August 31, 1998. A timely petition for rehearing was denied on September

25, 1998, and this Petition for Writ of Certiorari is filed within ninety (90) days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I.

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, The State-Record Co., Inc., publishes *The State* newspaper in Columbia, South Carolina. Respondent, B.J. Quattlebaum, at the time of the events giving rise to this matter was a defendant in a capital murder

prosecution in the Eleventh Judicial Circuit of South Carolina. On August 18, 1997, Respondent's counsel sought and obtained *ex parte* an order restraining and enjoining "all media" from disseminating the substance and details of a conversation between respondent and his attorney which had been recorded on video tape and audio tape by the Sheriff's Department for Lexington County, South Carolina. The motion for the temporary restraint was supported by an affidavit which made no factual showing that alternatives to prior restraint would fail to protect the criminal defendant's rights, but merely asserted such as a conclusion. (Appendix, p. App. 47). A copy of the court's Order of August 18, 1998 was transmitted to petitioner by facsimile. On August 19, 1997, petitioner moved to dissolve the *ex parte* temporary restraining order entered on August 18, 1997. A hearing was held on August 19, 1997, at which time the court without taking evidence in support of the restraint denied petitioner's motion to dissolve the restraining order and extended the prior restraint prohibiting publication until such time as a jury was empaneled in the criminal prosecution and sequestered. (Appendix, p. App. 42).

Petitioner appealed the prior restraint to The Supreme Court of South Carolina which affirmed the lower court's order on August 31, 1998. Petitioner filed a timely Petition for Rehearing which was denied on September 25, 1998.

Petitioner raised the issue of the application of the First and Fourteenth Amendments to protect against the imposition of a prior restraint on the press in its written motion of August 19, 1997, (Appendix, pp. App. 44-45) and orally at the hearing on August 19, 1997 (Appendix,

pp. 51-55; 62-65). The Court rejected petitioner's argument in its oral order of August 19, 1997. In its appeal to The Supreme Court of South Carolina, petitioner raised the issue in its brief at p. 10, stating:

> As in *Nebraska Press Ass'n*, there is no evidence in the case before this Court that the alternatives to prior restraint would not have protected respondent's right to a fair trial.

The Supreme Court of South Carolina stated in its opinion (504 S.E.2d at 594):

> [Petitioner] next contends the Circuit Court erred in issuing a prior restraint as [the criminal defendant] failed to meet his burden of justifying its necessity. We disagree.

Petitioner again raised the issue in its Petition for Rehearing, stating in paragraphs 3, 4, and 5:

> 3. the court below had no evidence to support a conclusion that there was a threat to the criminal defendant's "right to a fair judicial process;"
>
> 4. the court below made no findings supported by evidence that the alternatives to prior restraint would [not] have insured the criminal defendant a fair trial;
>
> 5. the decision of the United States Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 . . . (1976), remains controlling precedent and should have been applied. . . .

The Petition for Rehearing was denied on September 25, 1998. (Appendix, p. App. 43).

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF SOUTH CAROLINA HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, INCLUDING SPECIFICALLY *NEBRASKA PRESS ASS'N V. STUART*, 427 U.S. 539 (1976).

This Court has described the imposition of a prior restraint as "one of the most extraordinary remedies known to our jurisprudence" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 at 562, and the burden required to overcome the presumption of unconstitutionality is so great that the remedy has been invoked rarely. This case presents, as did *Nebraska Press Ass'n*, a confrontation between important constitutional protections. As this Court explained (427 U.S. at 569):

> Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. . . .

This Court held in *Nebraska Press Ass'n, supra*, that appellate review "must examine the evidence before the trial judge when the order was entered. . . . " 427 U.S. at 562. To support the imposition of a prior restraint, the trial court was required to have evidence before it to

support a finding that measures alternative to prior restraint would not have protected respondent's fair trial right. As in *Nebraska Press Ass'n*, no evidence was presented to the court below in support of a finding that the alternatives to prior restraint endorsed in *Nebraska Press Ass'n*, to-wit: a change of venue to a place less exposed to pre-trial publicity, postponement of the trial or searching voir dire, would not have protected respondent's rights. As in *Nebraska Press Ass'n*, the court made no specific findings and the record in this case does not support a conclusion "that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary." 427 U.S. at 569. Absent a finding that alternative measures would not have protected respondent's fair trial rights, and absent evidence in the record to support such a finding, respondent did not overcome the high barrier to prior restraint and the presumption against its use. The imposition of a prior restraint and the decision of The Supreme Court of South Carolina were in conflict with this Court's decisions.

II.

A PRIOR RESTRAINT ISSUED WITHOUT FACTUAL SUPPORT, IF ALLOWED TO STAND, WILL UNDERMINE THIS COURT'S OFT-STATED PRINCIPLE THAT PRIOR RESTRAINTS ON THE PRESS ARE PRESUMED UNCONSTITUTIONAL.

This Court has held that the main purpose of the First Amendment is to prevent prior restraint on publication, and a prior restraint comes before the court with a heavy presumption against its constitutional validity.

Nebraska Press Ass'n, supra; Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). This presumption against constitutional validity may be overcome only by specific findings in the record, based on evidence in the record, that measures alternative to prior restraint would not have protected respondent's right to a fair trial. Evidentiary support for a factual finding that measures alternative to prior restraint would not provide protection for a fair trial right is essential to engage the presumption against constitutionality of a prior restraint. Where, as in this case, a prior restraint is imposed without a finding that alternative measures would not have protected respondent's rights and a record lacking in evidence to support such a finding, the presumption against constitutional validity and this Court's rulings have been disregarded.

III.

A PRIOR RESTRAINT, EVEN OF SHORT DURATION, "IS A MATTER OF IMPORTANCE AND CONSEQUENCE IN VIEW OF THE FIRST AMENDMENT'S IMPERATIVE." *CARROLL V. PRESIDENT & COM'RS OF PRINCESS ANNE*, 393 U.S. 175 AT 184 (1968).

The Supreme Court of South Carolina characterized the prior restraint as "limited," 504 S.E.2d 592 at 597 (S.C. 1998), so as to support its conclusion that prior restraint was acceptable in this case. As this Court has held, any prior restraint, "is a matter of importance and consequence in view of the First Amendment's imperative." *Carroll, supra*, 393 U.S. 175 at 184 (1968). Furthermore, the prior restraint imposed in this case could not be fairly characterized as "limited" in that it prohibited totally the

publication of substantive information. If The Supreme Court of South Carolina considered the prior restraint limited because it restrained publication only until a jury was selected and sequestered, the temporal limitation is insufficient to justify the restraint as even a postponement of publication is constitutionally deficient. As this Court concluded in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the burden that must be borne by a party seeking to impose a prior restraint on publication is not reduced by the temporary nature of the restraint. Moreover, "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. . . . " *Nebraska Press Ass'n, supra*, 427 U.S. at 559.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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December 23, 1998.

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte The State
Record Co., Inc., Appellant,

v.

In Re State of South
Carolina
vs.
B.J. Quattlebaum, Respondent.

Appeal From Lexington County
Thomas W. Cooper, Jr., Judge

Opinion No. 24831
Heard October 22, 1997 – Filed August 31, 1998

AFFIRMED

Jay Bender and Kirby D. Shealy, III, of Baker, Barwick, Ravenel & Bender, of Columbia, for appellant.

Joseph M. McCullouch, Jr., of Columbia, A. Camden Lewis of Lewis, Babcock & Hawkins, of Columbia; Katherine E. Evatt and Donald V. Myers, of Lexington, for respondent.

WALLER, A.J.: This is an appeal of a temporary restraining order prohibiting the media from disseminating the contents of a videotape containing a privileged communication between the defendant herein, B.J. Quattlebaum, and his attorney. The State-Record Co., Inc. (The State/Newspaper) appeals. We affirm.

FACTS

Quattlebaum was indicted for murder, armed robbery, assault and battery with intent to kill and possession of a firearm during commission of a violent crime; the State sought the death penalty. While he was imprisoned at the Lexington County Detention Center, a privileged conversation between Quattlebaum and his attorney was surreptitiously recorded.[1] The videotape was thereafter disseminated to WIS-TV, a Columbia television station.[2] Upon learning of the videotape and its dissemination to the media, Quattlebaum moved for a temporary restraining order (TRO) prohibiting dissemination or characterization of its audio content. On August 18, 1997, the circuit court granted an *ex parte* TRO, pending a hearing the following day, prohibiting all trial participants and all media from disseminating the substance and details of the privileged communication.

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[1] It is undisputed that the conversation is in fact a privileged, attorney-client communication.

[2] The manner of its distribution is unknown and is not an issue on appeal.

Counsel for The State was notified by telephone and a copy of the order was served on it the same day.

After a hearing on August 19, 1997,[3] the circuit court continued its order in effect until such time as a jury was empaneled and sequestered in Quattlebaum's case.[4] The circuit court's order specifically notes that it does not "prohibit the reporting of the invasion of the attorney client privilege;" nor does it "restrain or prohibit [publication of] the identity of the individuals involved or the nature of the charges in the case." It simply prohibits the "dissemination of the contents of the communication or the characterization of its contents."

ISSUES

1. Did the circuit court have subject matter jurisdiction to issue the temporary restraining order?

2. Did the circuit court have personal jurisdiction over Newspaper?

3. Did the court err in imposing a prior restraint?

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[3] The State attended the hearing.

[4] The order on appeal has effectively expired since Quattlebaum was tried, convicted and sentenced to death while this appeal was pending. However, the fact that Quattlebaum has now been tried does not render our decision moot. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546, 96 S. Ct. 2791, 2797, 49 L. Ed. 2d 683 (court's jurisdiction is not defeated simply because the order attacked has expired, if the underlying dispute between the parties is one capable of repetition, yet evading review).

1. SUBJECT MATTER JURISDICTION

Initially, The State contends the court of general sessions is without subject matter jurisdiction to issue an injunction.[5] We disagree.

The general rule that a court in a criminal case will not issue an injunction is subject to the exception that a court, once having obtained jurisdiction of a cause of action, has inherent power to do all things reasonably necessary to the administration of justice in the case before it. 42 Am.Jur.2d *Injunctions* § 11 (1969). The United States Supreme Court has recently recognized the inherent authority of a court to protect its proceedings. *See Degen v. United States*, ___ U.S. ___, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996) (courts invested with judicial power have inherent authority to protect their proceedings in course of discharging their traditional responsibilities). We find it patent that a court of general sessions has subject matter jurisdiction to issue an injunction, if necessary, to protect its proceedings.

2. PERSONAL JURISDICTION

The State next argues the circuit court was without personal jurisdiction to bind it. We disagree.

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[5] The State premises this contention upon the holding of *State v. Franks*, 214 S.C. 525, 53 S.E.2d 608 (1949). *Franks* relied on Section 565, Code of 1942, later codified at S.C.Code Ann. § 15-55-10, which was repealed upon enactment of the South Carolina Rules of Civil Procedure (SCRCP) (in effect at the time of this action). Accordingly, *Franks* and section 15-55-10 are inapplicable.

Under Rule 65(d) of the South Carolina Rules of Civil Procedure (SCRCP), every order granting a restraining order is binding on the parties and "those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[6] Here, the only known media entity in possession of the videotape at the time Quattlebaum sought a TRO was WIS-TV, which was named and served with the motion for a TRO. We agree with the circuit court that The State was "in active concert" with WIS and had actual notice of the order so as to be bound by it. We find no error in the circuit court's assertion of personal jurisdiction over The State.

3. PRIOR RESTRAINT[7]

The State next contends the circuit court erred in issuing a prior restraint as Quattlebaum failed to meet his burden of justifying its necessity. We disagree. Under the extremely limited factual circumstances of this case, we find the circuit court properly enjoined dissemination of the privileged communication between Quattlebaum and his attorney.

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[6] Under Rule 65(b), a temporary restraining order, as was initially issued in this case, may be issued without notice.

[7] Some courts draw a distinction between a "gag order" restricting merely trial participants, which is not characterized as a prior restraint, and one directly restraining the media itself. *See, e.g., United States v. Davis*, 904 F. Supp. 564 (E.D.La.1995); *Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988). The order on appeal directly enjoins the media. Accordingly, it is clearly properly characterized as a prior restraint.

This Court is faced with a profound dilemma: whether to uphold a prior restraint upon the media's First Amendment[8] right of free speech, a task which carries with it an extremely heavy burden upon the party seeking to limit the speech;[9] or whether to invalidate the prior restraint placing in jeopardy the fundamental right of a defendant to a fair trial pursuant to the Sixth Amendment.[10] We are faced with the added quandary that the information sought to be disseminated by the media is a privileged communication between a criminal defendant and his attorney.[11]

---

[8] U.S. CONST. amend. I; S.C. CONST. art. I, § 2.

[9] *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-59, 96 S. Ct. 2791, 2801-03, 49 L. Ed. 2d 683, 695-98 (1976); *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) (setting forth presumption of unconstitutionality of prior restraints).

[10] U.S. CONST. amend. VI; S.C. CONST. art. I, § 14.

[11] We note, at the outset, that there is very little precedent regarding a balancing of the competing interests in this regard. Only one case, *United States v. Noriega*, has involved violation of the attorney client privilege. There have been a series of opinions in *Noriega*. The first was issued by the United States District Court for the Southern District of Florida. *United States v. Noriega*, 752 F. Supp. 1032 (S.D.Fla.1990) (*Noriega 1*). In *Noriega 1*, the district court temporarily enjoined Cable News Network (CNN) from broadcasting tape recordings of privileged telephone conversations between Manuel Noriega and his defense team, until such time as the tape recordings could be reviewed by a federal magistrate to ascertain whether the defendant's right to a fair trial would be jeopardized by publication of the contents. The Eleventh Circuit affirmed the grant of the temporary injunction on the ground that CNN's failure to produce the tape recording had prevented the district court from balancing the defendant's right to a fair trial with

To date, the United States Supreme Court has declined to assign priorities between the First Amendment right of free press and the Sixth Amendment right to a fair trial.[12] In *Nebraska Press Ass'n v. Stuart*, 427 U.S.

CNN's First Amendment rights. *United States v. Noriega*, 917 F.2d 1543 (11th Cir.1990) (*Noriega 2*). The United States Supreme Court denied certiorari. *Cable News Network, Inc. v. Noriega*, 498 U.S. 976, 111 S. Ct. 451, 112 L. Ed. 2d 432 (1990). Thereafter, the district court held Noriega had not met his burden of demonstrating the necessity of a permanent injunction, in part because a portion of the privileged attorney-client conversation had already been broadcast by CNN (such that it was moot), and that the remaining portion of the privileged conversation was simply not so prejudicial as to warrant a prior restraint. *United States v. Noriega*, 752 F. Supp. 1045 (S.D. Fla. 1990) (*Noriega 3*). The court in *Noriega 3* also found Noriega's claim that his Sixth Amendment right to effective assistance of counsel was jeopardized insufficient to justify the continued prior restraint, since alternative measures were available through which to prevent prosecutorial tainting. *Id.*

[12] Although the Supreme Court has declined to do so, a number of lower courts have held that a defendant's Sixth Amendment right to a fair trial is superior to the right of free speech and that, where the two rights collide, the latter must give way to the former. *Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir.), *cert. denied*, 488 U.S. 496 (1988) (when exercise of free press rights actually tramples on Sixth Amendment rights, former must yield to the latter); *United States v. Davis*, 904 F. Supp. 564 (E.D. La. 1995); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir.1975), *cert. denied*, 427 U.S. 912 (1976); *News Journal Corp. v. Foxman*, 939 F.2d 1499 (11th Cir.1991) (when First Amendment claims impinge on Sixth Amendment right to trial by impartial jury, asserted First Amendment freedoms must yield to the 'most fundamental of all freedoms,' the right to a fair trial for the accused); *Mockaitis v. Harcleroad*, 938 F. Supp. 1516 (D. Or. 1996), *rev'd on other grounds*, 104 F.3d 1522 (9th Cir.1997).

539, 561, 96 S. Ct. 2791, 2803-04, 49 L. Ed. 2d 683, 699 (1976), the Court specifically declined to rule on the issue, stating:

> The authors of the Bill of Rights did not undertake to assign priorities as between the First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. . . . [I]t is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

Notwithstanding its reluctance to assign priorities between the competing interests, the Court has recognized that the right of a defendant to a fair trial is "the most fundamental of all freedoms – [which] must be maintained at all costs." *Estes v. State of Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543, 549 (1965). More recently, the Court noted that "No right ranks higher than the right of an accused to a fair trial." *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 637 (1984).

The *Nebraska Press* Court recognized a trial court's duty to protect the defendant's constitutional right to a fair trial from the impact of pretrial publicity:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . [T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . where there is a reasonable likelihood that prejudicial news

> prior to trial will prevent a fair trial, the judge should [take such measures as continuance, change of venue, sequestration, or a new trial]. . . . But we must remember that reversals are but palliatives; **the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.**

427 U.S. at 552-53, 96 S. Ct. at 2800, 49 L. Ed. 2d at 694 (emphasis supplied) (*citing Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)). *See also Noriega*, 752 F. Supp. at 1049-51.

Citing Learned Hand,[13] *Nebraska Press* established a three-prong balancing test to determine whether a prior restraint is justified:

1. The nature and extent of pretrial publicity;
2. Whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and
3. How effectively a restraining order would operate to prevent the threatened danger.

427 U.S. at 562-68, 96 S. Ct. at 2804-07, 49 L. Ed. 2d at 699-703. *Nebraska Press* specifically noted that "[t]he precise terms of the restraining order are also important." *Id.* at 562, 96 S. Ct. at 2804, 49 L. Ed. 2d at 699.

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[13] "[T]he gravity of the 'evil' as discounted by its improbability, justifies such invasion of free speech as is **necessary** to avoid the danger." 427 U.S. at 562, 96 S. Ct. at 2804, 49 L. Ed. 2d at 699 (emphasis supplied) (*citing United States v. Davis*, 183 F.2d 201, 212 (2d Cir.1950), *aff'd*, 341 U.S. 494 (1951)).

We find the remedial measures employed by the trial court here were **necessary** to guarantee Quattlebaum's right to a fair trial.[14] Moreover, the restraint imposed by the trial court was as narrowly tailored, both in scope and duration, as was possible under the circumstances.

Here, as to the first element, although Quattlebaum's case was not extremely "sensational," it was a death penalty case which received media attention throughout the state due, in large part, to the videotape in question. We find sufficient evidence in the record from which to conclude the pretrial publicity in this case had the potential to impair the Quattlebaum's right to a fair trial. *Accord Nebraska Press*, 427 U.S. at 562-63, 96 S. Ct. at 2804, 49 L. Ed. 2d at 700 (notwithstanding impact of publicity is "of necessity speculative," dealing as a court must with factors unknown and unknowable, court could reasonably conclude, based on common human experience, that publicity might impair defendant's right to a fair trial).

Further, we find the third prong of *Nebraska Press* is met in this case. Undoubtedly, the prior restraint prevented prospective jurors from learning the contents of the privileged communication contained on the videotape. Clearly, it prevented the threatened danger to Quattlebaum's right to a fair trial.[15]

---

[14] Although other measures may have, as discussed below, mitigated the effects of pretrial publicity, the only measure certain to ensure Quattlebaum's fundamental right to a fair trial was imposition of the prior restraint.

[15] Unlike the situation in *Nebraska Press*, the prior restraint here was manageable because the only known media sources in possession of the videotape were local media television stations

The most troubling element of *Nebraska Press* is the second prong, whether "other measures would be likely to mitigate the effects of unrestrained pretrial publicity." The problem with application of this factor is that it is simply untenable to suggest that other measures would not, in any case, be "likely to mitigate" the effects of pretrial publicity. It could always be argued that other measures would, to some degree, "mitigate" the effects of pretrial publicity.[16] "Mitigate" is defined as "to make less severe, alleviate. . . . " NEW WEBSTER'S DICTIONARY AND THESAURUS 640 (1993). Although alternate measures might "make less severe" the effects of pretrial

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and newspapers. Since all parties and media in possession of the tape were restrained from disclosing its contents, the territorial problems espoused by the Court in *Nebraska Press* were much less troublesome. The fact that people may have speculated as to the contents of the videotape in question is simply insufficient to rule that Quattlebaum had not met his burden of demonstrating a prior restraint would prevent the threat to his right to a fair trial. On the contrary, this is one of those "unknown and unknowable" ramifications which, we find, justifies the trial court's conclusion that the prior restraint would prevent the harm in this case.

[16] Under a literal application of the second prong of *Nebraska Press*, it is questionable whether the test could ever be met. *See* L. Tribe, *American Constitutional Law* 858-59 (2d Ed.1988) (Supreme Court's confidence that alternatives to prior restraints on media will adequately deter any adverse impact of publicity suggests that *Nebraska Press* acts as "a virtual bar to prior restraints" on the press); Bernabe-Riefkohl, *Prior Restraints on the Media and The Right to a Fair Trial: A Proposal for a New Standard*, 84 Ky.L.J. 259, 290-91 (1995-96) (standard of *Nebraska Press* is almost impossible to meet as a defendant cannot demonstrate that twelve impartial jurors cannot be found or that alternative measures will not eliminate risks).

publicity, they could not, in this case, **ensure** Quattlebaum's right to a fair trial. Were we to premise our analysis **solely** upon whether other measures would be "likely to mitigate" the effects of pretrial publicity, then we can conceive of **no** situation which would meet the elements of *Nebraska Press*. We do not believe the Supreme Court intended the second prong of Nebraska Press to be read in isolation so as to foreclose the possibility, in all circumstances, of a prior restraint. Had it intended such a result, it would have imposed an absolute ban on prior restraints. Indeed, a majority of the Court specifically declined to do so,[17] stating:

> However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently

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[17] At least four of the justices in *Nebraska Press* advocated a position that a prior restraint on the press could, in no circumstances, be justified. *See* 427 U.S. at 570, 96 S. Ct. at 2808, 49 L. Ed. 2d at 704 (Justice White concurring); *Id.* at 572, 96 S. Ct. at 2809, 49 L. Ed. 2d at 705 (Justices Brennan, Stewart and Marshall concurring). *See also* Peterson, *A First Amendment-Sixth Amendment Dilemma: Manuel Noriega Pushes the American Judicial System to the Outer Limits of the First Amendment*, 25 J. Marshall L.Rev. 563, 579 (1992) (noting that concurrences in *Nebraska Press* test makes prior restraints on publication of information already obtained an impossible order to justify); Bernabe-Riefkohl, *supra* note 16, at 267 (suggesting standard set forth by Supreme Court is inoperable and confusing, and courts should adopt absolute rule against the use of prior restraints).

> rejected the proposition that a prior restraint can never be employed.

427 U.S. at 570, 96 S. Ct. at 2808, 49 L. Ed. 2d at 704.

Rather, as we view the *Nebraska Press* test, it must be viewed in its entirety, with a view toward **ensuring** a defendant's fundamental right to a fair trial, and not merely with an eye toward "mitigating the effects" of pretrial publicity. As noted previously, the *Nebraska Press* Court specifically noted that such invasion of free speech as is **necessary** to avoid the danger is permissible. *See supra* note 13.[18] We find the limited prior restraint

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[18] A number of courts and commentators have recognized that the "alternative measures" suggested by *Nebraska Press* are, in reality, insufficient. As one court has noted, "[e]mphatic jury instructions to disregard prejudicial publicity is an unsatisfactory solution." *Davis*, 904 F. Supp. at 569. *See also KUTV v. Wilkinson*, 686 P.2d 456 (Utah 1984) (finding neither sequestration nor voir dire were sufficient alternatives to imposition of restraining order). Additionally, it has been argued that other alternatives do not sufficiently safeguard the right to a fair trial:

> Postponement may encroach on the accused's right of a speedy trial and may actually increase publicity in a case of great public interest; change of venue involves delay presenting the problems associated with postponement, local communities have an interest in local adjudication, and a highly publicized criminal case likely will cause prejudicial information to be disseminated nationally, rendering change of venue ineffective; voir dire cannot remove individuals who have read previous newspaper accounts and a larger jury pool may result in a greater number of people who have been exposed to prejudicial publicity or to a delay in voir dire with an enhanced opportunity for improper publicity to occur; jury sequestration is not

imposed here was necessary to avoid the potential prejudice to Quattlebaum as would ensue from disclosure of the videotape. Were we to hold otherwise, the contents of the videotape in question could have been disclosed and the substance of the privileged communication with his attorney divulged. Once disclosed, although other measures might have **alleviated** the prejudice to Quattlebaum, his right to a fair trial could not have been guaranteed.[19] In our view, the United States Supreme Court did not intend such a result in establishing the *Nebraska Press* test. Accordingly, we find the threat of prejudice to Quattlebaum's right to a fair trial justified the prior restraint here.

> only a drastic measure, requiring the jurors to compensate for the publicized actions of trial participants, but also lengthy jury sequestration can cause the bias of resentment, the desire to end deliberation, and cannot remove prejudice from publicity prior to impanelment and jury instructions may be ineffective regardless of pretrial publicity because the great detail present in jury instructions in a highly publicized criminal trial may not highlight precisely the issues the jurors are being instructed not to consider.

Stabile, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case*, 79 Geo. L.J. 337, 343-45 (1990). *See also* Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 Stan. L.R. 561 (1990) (recognizing inadequacy of alternative measures set forth in *Nebraska Press* and *Sheppard v. Maxwell*); *Davis*, 904 F. Supp. at 568-69.

[19] Once a privileged communication has been disclosed to the public, it can never be recalled and the right to a fair trial may have been forever jeopardized. *Accord United States v. Davis*, 904 F. Supp. 564, 569 (E.D. La. 1995) (it is difficult, if not impossible, to "unring a bell").

Our decision to affirm the circuit court's issuance of a temporary restraining order is bolstered by the uncertainty of the precise standard necessary to justify a prior restraint in cases in which the defendant claims, not only that pretrial publicity threatens his right to a fair trial, but also that his attorney client privilege has been violated, thereby jeopardizing his right to effective assistance of counsel.[20] We refer to the uncertainty created by the decisions of the District Court, and the Eleventh Circuit Court of Appeals, in *United States v. Noriega*. *See supra* note 11.

As noted in Footnote 11, the *Noriega* cases involved the recording of Manuel Noriega's privileged telephone calls with his attorneys while in prison in Florida. The United States District Court for the Southern District of Florida temporarily restrained CNN, which had gained possession of the tapes, from broadcasting the recordings until it could determine **whether** broadcasting the tapes would prejudice Noriega's trial. 752 F. Supp. 1032 (S.D. Fla. 1990) (*Noriega 1*). Clearly, this does not comport with the *Nebraska Press* three-prong test as that test requires a showing of prejudice in the first instance before a prior restraint is ever justified. Nonetheless, the Eleventh Circuit upheld the restraining order. 917 F.2d 1543 (11th Cir. 1990) (*Noriega 2*).[21] In doing so, the Eleventh Circuit

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[20] In *Noriega 3*, the District Court, on remand, analyzed the claims as two separate prongs: the defendant's Sixth Amendment right to a fair trial, and his Sixth Amendment right to effective assistance of counsel. It applied the three prong *Nebraska Press* test to both rights.

[21] A number of commentators have recognized misapplication of the *Nebraska Press* test in *Noriega 1* and *Noriega 2*.

noted that "the determination of whether the telephonic communications between Noriega and his defense counsel are privileged, while not **necessarily** dispositive of whether such communication should be publicly broadcast, would be relevant to the District Court's assessment of potential harm to Noriega's right to a fair trial." *Id.* at 1551. The Supreme Court denied certiorari, over the dissent of Justices Marshall and O'Connor. 498 U.S. 976, 111 S. Ct. 451, 112 L. Ed. 2d 432 (1990).

In light of the opinions in *Noriega 1 and 2*, it is uncertain precisely how the Supreme Court would rule if faced directly with the issue of a prior restraint in the context of the media's threatened disclosure of confidential conversations obtained in violation of the attorney client privilege. At least one commentator has speculated that the denial of certiorari in *Noriega* leaves open the possibility that the *Nebraska Press* standard is open to revision. *See* Splichal and Bunker, *The Supreme Court and Prior Restraint Doctrine: An Ominous Shift?*, 3-SPG Media L. & Pol'y 9, 11, 12 (1994) (speculating that alarm expressed in dissenting opinion in Supreme Court's denial of certiorari suggests a majority of the Court might be willing to give judges a freer reign in balancing First Amendment principles with fair trial concerns). Accordingly, in light of the confusion surrounding the *Noriega*

See Peterson, *supra* note 17, at 563; Splichal and Bunker, *The Supreme Court and Prior Restraint Doctrine: An Ominous Shift?*, 3-SPG Media L. & Pol'y 9 (1994); Schweiker, *United States v. Noriega: Conflicts Between the First Amendment and Rights to a Fair Trial and Privacy*, 1993 U.Chi. Legal F. 369, 374 (1993).

cases,[22] we find the matter is better left to the United States Supreme Court for resolution. Should that Court wish to establish an alternative standard from that set forth in *Nebraska Press*, or to adopt an absolute ban on prior restraints, it is free to do so.

CONCLUSION

It is difficult to conceive of a situation in which the rights of a defendant to a fair trial were more at jeopardy than the instant case.[23] If Quattlebaum's Sixth Amendment rights were insufficient to justify imposition of the prior restraint in this case, we can think of no situation in which a prior restraint would ever be justified or in which alternative measures would not be found sufficient to mitigate any threatened prejudice. Since *Nebraska Press* did not foreclose the possibility that there may be situations in which a prior restraint is justified, we find the egregious circumstances of this case sufficient to warrant

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[22] Although the Eleventh Circuit ultimately concluded Noriega was not entitled to continuation of the restraining order, 752 F. Supp. 1045 (11th Cir. 1990) (*Noriega 3*), that decision was based in large part on the fact that the tapes in question contained only two conversations falling within the attorney client ambit, one of which had already been broadcast by CNN, and the other of which was so "cryptic and disjointed" that Noriega's counsel conceded it was not prejudicial insofar as impaneling an impartial jury was concerned. *Id.* at 1053. *Noriega 3* sheds no light on the appropriate standard to be applied in cases such as that presently before the Court.

[23] Unfortunately, both this Court's and the lower court's hands are somewhat "tied" in this case in that it is impossible, without disclosing the contents of the videotape, to accurately portray the potential prejudice to Quattlebaum.

imposition of the extremely limited temporary restraining order imposed by the circuit court.[24] Any contrary holding would potentially have denied Quattleba 1's fundamental right to a fair trial and have been shocking to the universal sense of justice; such a result will not be endorsed by this Court. Accordingly, the judgment below is

AFFIRMED.

FINNEY, C.J., MOORE and BURNETT, JJ., concur. TOAL, A.J., concurring and dissenting in separate opinion.

TOAL, A.J.: I concur as to the majority's discussion of subject matter jurisdiction and personal jurisdiction, but dissent as to the validity of the prior restraint.

At the outset, it is essential to understand that all prior restraints are not equal. It is also important to understand what the present prior restraint is, and what it is not. The prior restraint here is a **judicial** restraint on the disclosure by the press of an attorney's private consultation with his client. By restraining publication, the trial court has attempted to protect and preserve the integrity of a criminal trial and the constitutional values which inhere therein. What this prior restraint is not is an executive, legislative, or judicial prior restraint of the

[24] As noted previously, the order on appeal does not prohibit publication of the existence of the videotape, or the fact of the invasion of the attorney client privilege. It does not even prohibit the videotape itself from being aired by the media; it merely restricts dissemination of the contents of the privileged communication itself, or the characterization of the contents.

expression of an opinion. It is also not a permanent restraint on the publication of the attorney-client conference.

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " U.S. Const. amend. I. On its face, the provision seems to apply only to legislative abridgements of free speech, restricting as it does congressional action.[1] The application of the First Amendment to judicial prior restraints is a late twentieth century phenomenon.[2] Although the history of the drafting of the First Amendment, as well as the literal language of the amendment itself, suggest that it was intended solely as a limitation on legislative restraints of

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[1] *See* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U. L. Rev. 1156 (1986) (arguing that a First Amendment basis for striking down judicial prior restraints rests on a "shaky foundation" and that the Fourteenth Amendment due process clause would be the better source for restricting state courts in this regard).

[2] The Supreme Court's first case involving a judicial prior restraint was *Carroll v. President of Princess Anne County*, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968). In *Carroll*, the trial court issued an order restraining a white supremacist organization from holding, for more than ten months, rallies or meetings that would tend to disturb and endanger the citizens of the county. The judicial proceedings held to consider the order were conducted *ex parte* with no notice being given to the white supremacist group. The Supreme Court ultimately struck down the judicial prior restraint, stating, "The issuance of an injunction which aborts a scheduled rally or public meeting, even if the restraint is of short duration, is a matter of importance and consequence in view of the First Amendment's imperative." 393 U.S. at 184, 89 S. Ct. at 353, 21 L. Ed. 2d at 333.

speech and the press, today it is assumed that this language encompasses judicial restraints. In modern First Amendment litigation no one questions whether or not the prohibition against judicial prior restraints might be limited to orders based on statutes. Perhaps the time has passed when such a question could be seriously addressed by an appellate court. But what should legitimately be revisited in the view of the majority, and in my view, is whether or not the same analysis should be applied to *all* judicial prior restraints.

A fair trial is guaranteed to litigants in both civil and criminal disputes. Does it make a difference whether the judicial prior restraint is simply a device to prevent premature publicity of matters at issue in a civil or criminal trial as opposed the prior restraint at issue in the instant capital murder case where the court also seeks to safeguard such constitutional values such as the protection against self-incrimination, the right to an attorney of the defendant's choosing, and the right to a speedy trial?

Presently, the rigid *Nebraska Press* test is the only tool trial judges have to address questions of prior restraint, whether legislative or judicial, whether in the criminal or civil context, and whether in the high-profile capital murder case or misdemeanor traffic court. While there is a certain elegant simplicity in "bright line" tests from the standpoint of appellate judges, such tests really do not give meaningful and practical guidance to trial judges.

In high-profile criminal cases, trial judges frequently encounter a media frenzy which they must deal with in a matter of hours. In this case, the police taped defendant's very first conversation with his lawyer, just after he was

arrested for murder. The prosecution retained this tape for over a year unbeknownst to defendant or his lawyer. The tape was leaked to the largest television station in the area from which defendant's jury would be selected. The possibility of a tainted jury venire was very real. The trial judge proposed to solve this dilemma by restraining the media from publishing the attorney-client conversation until the jury had been empaneled. The television station involved here was responsible enough to voluntarily restrain publication of the surreptitiously taped attorney-client conference until a hearing could be held.

The *Nebraska Press* test requires the trial court to make detailed findings on all available alternatives. This may be unrealistic in the real world of high-profile criminal trials. Additionally, it forces the trial judge to make choices between other constitutional values. It may always be possible to posit other "possible" alternatives to judicial prior restraints. If a trial judge has to eliminate all other alternatives (a crystal ball exercise since none of the "alternatives" will have been put into play), then in reality there exists an absolute prohibition against any prior restraint. Are the protections of the Fifth and Sixth Amendments thus sacrificed to the demands of the modern day media for instant public dissemination of any information to which it falls privy no matter the impact on the fairness of the trial? In the final analysis, *Nebraska Press*, for all its language to the contrary, may have effectively established the constitutional doctrine that the First Amendment trumps the Fifth, Sixth, and Fourteenth Amendments.

The majority opinion is a scholarly and thoughtful review of the leading authorities on the question of

whether a prior restraint of the press can ever be ordered by a trial judge in this country. The majority argues that the application of the *Nebraska Press* test here damages the defendant's most fundamental due process rights in three important respects. First, the sanctity of his attorney-client privilege has been invaded. Second, his Fifth Amendment right against compulsory self-incrimination has potentially been compromised. Finally, the selection of the normal alternatives to the prior restraint, including continuance of the case until public attention abates, change of venue to a locale not so infected with the pretrial publicity, and voir dire questioning of the jury to eliminate any biased jurors, impairs the defendant's right to a speedy trial by a jury of his peers.

As noted above, I agree with the majority that the *Nebraska Press* test should be revisited by the Supreme Court. A standard must be formulated that adequately addresses the pressures and complex constitutional concerns that accompany a high-profile murder case. That said, I find myself compelled to dissent under the current state of the law. Further, the majority's proposed standard falls short of the kind of sophisticated test required in this situation. Although more flexibility in issuing a prior restraint may be deserving in a case such as this, it should not result in a "rubber stamped" restraint whenever there is any potential prejudice to the defendant. An examination of less restrictive alternatives must remain part of the analysis.

As discussed by the majority, in this century the United States Supreme Court has consistently interpreted the First Amendment as mandating a "heavy presumption" against the constitutional validity of prior

restraints. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971); *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931). This presumption is largely the result of Justice Oliver Wendell Holmes's famous declaration in *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L.Ed. 879 (1907): "[T]he main purpose of [the First Amendment] is to prevent all such *previous restraints* upon publications as had been practiced by other governments."[3] The question before this Court is at what point must this "heavy presumption" give way to a defendant's right to a fair trial.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), the United States Supreme Court addressed this very issue. The defendant was charged with murdering six members of a family in the small town of Sutherland, Nebraska, a town of about 850 people. Due to the notoriety of the case, the trial court issued an order prohibiting the press from publishing specific aspects of the trial. The Nebraska Supreme Court upheld the restraint with some modifications. The United States Supreme Court reversed, finding the prior restraint invalid under its three-prong test.

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[3] Holmes's interpretation of the First Amendment had its origins in Blackstone's *Commentaries:* "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 William Blackstone, Commentaries 151; *see* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 Cal.L.Rev. 391, 398 (1992).

In this case, the majority questions the second prong of the Nebraska Press test. The majority states that under this prong no situation can be conceived of in which a prior restraint would be justified because alternative measures would almost always be likely to mitigate the effects of pretrial publicity. The majority asserts that such a standard is untenable as it would be impossible for a court to ensure a defendant's Sixth Amendment right to a fair trial. I share the majority's concern and agree that the second prong of the *Nebraska Press* test should not be read in isolation. The test itself does not require invalidation of a prior restraint solely because other measures might mitigate the effects of the pretrial publicity. It is a balancing test. A court must consider the degree to which other measures will mitigate the adverse effects of the pretrial news coverage in light of the nature and extent of that publicity. *See Nebraska Press*, 427 U.S. at 569, 96 S. Ct. at 2807, 49 L. Ed. 2d at 703 ("We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary."). The presumption, however, is heavily in favor of using alternative measures. As noted by the Court in *Nebraska Press*, "our conclusion [that the prior restraint is invalid] is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." *Nebraska Press*, 427 U.S. at 569, 96 S. Ct. at 2807-08, 49 L. Ed. 2d at 703.

In this case, there is little doubt that other measures might mitigate the effects of the pretrial publicity. The

pertinent question under *Nebraska Press* is whether such alternatives would **sufficiently** mitigate those effects. Under the current state of the law, I am compelled to answer yes to this question.

The Supreme Court's first prior restraint decision was *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357, which involved a legislative restraint on publication. By invalidating the restraint, the Court in *Near* echoed Holmes's earlier proclamation in *Patterson* that the primary objective of the First Amendment was to avoid prior restraints. Quoting James Madison, the Court stated, " 'This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.' " *Near*, 283 U.S. at 714, 51 S. Ct. at 630, 75 L.Ed. at 1366. The Court further observed, "The preliminary freedom [of the press] extends as well to the false as the true." *Id.*

It was not until 1968 that the Supreme Court added to its First Amendment jurisprudence a presumption against **judicial** prior restraints. *See Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325. The Court's invalidation of judicial prior restraints came without an explanation of why the First Amendment was applicable to such orders. *Id.* (simply concluding that there is a "heavy presumption" against prior restraints under the First Amendment). In *New York Times Company v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), the government sought to enjoin the New York Times and the Washington Post from publishing a classified study of the Vietnam war. Despite the weighty countervailing interest of national security,

the Supreme Court refused to sustain the judicial prior restraint. In a concurring opinion, Justice Black borrowed James Madison's remarks concerning the Bill of Rights: "'the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.'" *New York Times*, 403 U.S. at 716, 91 S. Ct. at 2142, 29 L. Ed. 2d at 826.

The majority emphasizes that the Supreme Court in *Nebraska Press* declined to assign priorities between the First and Sixth Amendments. As such, the majority seeks to take advantage of this apparent indecision by suggesting the primacy of the Sixth Amendment. The majority notes that "a number of lower courts have held that a defendant's Sixth Amendment right to a fair trial is superior to the right of free speech and that, where the two rights collide, the latter must give way to the former." However, none of the cases cited by the majority involved prior restraints.[4] In fact, these cases explicitly

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[4] The majority's references to *Estes v. State of Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) and *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) are also unavailing. In *Estes*, the Supreme Court faced the issue of whether television cameras in the courtroom violated the defendant's due process rights under the Fourteenth Amendment. The issue had nothing to do with the validity of a prior restraint. The only remedy available to the defendant was a reversal of his conviction. Finding the defendant's due process rights were violated, the Court stated, "We have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs." 381 U.S. at 540, 85 S. Ct. at 1632, 14 L. Ed. 2d at 549. The Court then observed, "Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions." *Id.* The Court in no way intimated that it intended to elevate an

distinguished prior restraints from other restrictions on freedom of expression and acknowledged the virtual per se invalidity of the former.

In *News-Journal Corporation v. Foxman*, 939 F.2d 1499 (11th Cir.1991), the Eleventh Circuit faced the question of whether a trial court could limit extrajudicial commentary of trial participants. Citing *Nebraska Press*, the Eleventh Circuit noted that such orders were less restrictive than prior restraints on the press for averting the effects of prejudicial pretrial publicity. The court further recognized that there was a "heavy presumption" against prior restraints. *See Foxman*, 939 F.2d at 1512 (*citing Nebraska Press*). The court reiterated the Supreme Court's recommendation to use measures other than prior restraints in mitigating the effects of pretrial publicity. Consequently, the Eleventh Circuit found the restriction on extrajudicial statements to be an acceptable alternative.[5]

Like the court in Foxman, the Second Circuit in *Application of Dow Jones & Company* 842 F.2d 603 (2d Cir.1988),

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accused's right to a fair trial above the well established presumption against prior restraints.

In *Press-Enterprise*, the Court dealt with the right of the public to attend *voir dire* proceedings in a criminal case. The case did not deal with a prior restraint. The Court invalidated the trial court's order to close the proceedings and vindicated the public's right to attend the proceedings. The Court found that the trial judge had failed to consider alternatives to closure and did not make findings sufficiently specific for review by an appellate court.

[5] *See also* Stabile, *Free Press – Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 Geo. L. J. 337 (1990).

cert. denied, 488 U.S. 946, 109 S. Ct. 377, 102 L. Ed. 2d 365 (1988), addressed the constitutionality of a lower court order restricting extrajudicial statements by trial participants. In distinguishing prior restraints from the restriction before it, the court stated,

> [T]here is a substantial difference between a restraining order directed against the press – a form of censorship which the First Amendment sought to abolish from these shores – and the order here directed solely against trial participants and challenged only by the press. The distinction is critical.
>
> The most offensive aspect of a prior restraint is the censorship involved by forbidding the dissemination of information already known to the press and therefore public. A prior restraint deprives the public of specific news because it prevents publication. Although the restraining order in this case limits the flow of information readily available to the news agencies – and for that reason might have an effect similar to that of a prior restraint – the fact that the order is not directed at the news agencies and that they therefore cannot be haled into court for violating its terms deflates what would otherwise be a serious concern regarding judicial censorship of the press. For this reason the order is considerably less intrusive of First Amendment rights than one directly aimed at the press.

Application of Dow Jones & Company, 842 F.2d at 608.

These cases demonstrate that while it may be permissible for a court to restrict some First Amendment freedoms in order to protect a defendant's right to a fair trial, it is almost never acceptable for a court to impose a prior

restraint.[6] At most, the two interests share equal prominence in the Constitution.

The Supreme Court in *Nebraska Press* sought to reconcile these interests without creating an arbitrary hierarchy. First, the Court recognized that "[a] prior restraint, . . . by definition, has an immediate and irreversible sanction." *Nebraska Press*, 427 U.S. at 559, 96 S. Ct. at 2803, 49 L. Ed. 2d at 697-98. Conversely, pretrial publicity does not inflict an immediate injury but only poses "a risk that [the publicity will] have some adverse impact on the attitudes of those who might be called as jurors." *Id.* at 569, 96 S. Ct. at 2807, 49 L. Ed. 2d at 703 (emphasis added). In other words, any injury to the defendant is measured by probability; whereas, the prior restraint is a present transgression of a core constitutional right. By employing the remedial measures suggested in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966),[7] the prior restraint is immediately rectified and any future risk of not having a fair trial is cured. This is

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[6] *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir.1975) (finding that there was no prior restraint, and therefore, the court did not have to begin its examination with a "heavy presumption" against validity); *United States v. Davis*, 904 F. Supp. 564 (E.D. La. 1995); Stabile, 79 Geo.L.J. at 341 ("While it may be permissible to restrict freedom of expression in order to protect a defendant's right to a fair trial, not all means of restriction are acceptable.").

[7] These measures include: (1) change of trial venue to a place less exposed to the publicity; (2) postponement of the trial; (3) questioning of prospective jurors; (4) jury sequestration; and (5) clear instructions to the jury to decide issues only on the evidence. *See Nebraska Press*, 427 U.S. at 563-64, 96 S. Ct. at 2805, 49 L. Ed. 2d at 700.

exactly what the second prong of the Nebraska Press test attempts to achieve. *See U.S. v. Noriega*, 752 F. Supp. 1045, 1054 (S.D. Fla. 1990) ("If nothing else, *Nebraska Press* stands for the proposition that speculative harm falls well short of the showing necessity for the imposition of a prior restraint.").

As discussed above, any injury to Quattlebaum is measured solely by probability. All the while, the constitutional infirmity of the prior restraint persists. Therefore, to justify such an immediate and profound infringement of the First Amendment, *Nebraska Press* requires a finding that, absent the prior restraint, the defendant will be denied a fair trial. The record here simply does not support such a conclusion. The trial court's consideration of alternative measures was, at best, cursory. The trial court failed to make specific findings regarding the degree to which other measures would mitigate the effects of the pretrial publicity.[8] Such findings are basic to the balancing required by *Nebraska Press*. If the trial court had explored each of the alternatives, it would have had to conclude that the prior restraint was not necessary.[9]

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[8] The trial court simply concluded, "The publication or the transmission of that privileged communication, or its characterization would make it much more unlikely that the defendant could obtain a fair and impartial trial, given even all the protections that our system has in place to ensure a fair and impartial trial."

[9] Even the majority admits that this case is not "extremely sensational."

Finally, the majority asserts that its decision to affirm the restraining order is "bolstered by the uncertainty of the precise standard necessary to justify a prior restraint in cases in which the defendant claims, not only that pretrial publicity threatens his right to a fair trial, but also that his attorney-client privilege has been violated, thereby jeopardizing his right to effective assistance of counsel." Again, I join the majority's frustration in not having a more suitable test with which to address the unique and profound constitutional concerns presented in this case. Nevertheless, under current case law, I remain compelled to conclude that the prior restraint here must be struck down.

In *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (*Noriega I*), the federal district court faced the question of whether to restrain the publication of privileged conversations between Noriega and his defense team. The court imposed a temporary restraining order until it could review the tapes. The Eleventh Circuit affirmed the district court's order. 917 F.2d 1543 (11th Cir.1990) (*Noriega II*). The majority suggests that *Noriega I* and *Noriega II* create doubt as to the applicability of the *Nebraska Press* test in cases involving privileged communications. In *Noriega III*, the district court explicitly sought to dispel such an interpretation. 752 F. Supp. 1045 (S.D.Fla.1990). The court stated that "[i]n order to make the factual findings mandated by *Nebraska Press*, it was necessary to review the subject tapes." 752 F. Supp. at 1049. The court further noted that it had to contend with CNN's refusal to produce the tapes, and as a result, the court imposed the temporary restraining order. However, the court emphasized that its decision was not a comment on the

priority between Noriega's First and Sixth Amendment rights. *Id.* at 1051 ("the court had *not* then concluded that Noriega's Sixth Amendment right to a fair trial outweighed CNN's First Amendment right to be free of prior restraints on publication. . . . ").

In *Noriega III*, the district court summarized the inquiry mandated by the Eleventh Circuit in *Noriega II*:

> [T]he fact that conversations may or may not fall within the protections of the [attorney-client] privilege has no bearing on whether Noriega's right to an impartial jury will be clearly and irreparably harmed by publication. . . . Guaranteeing Noriega's right to counsel involves an equally serious but much **narrower** inquiry. There, the court is concerned only with the extent to which the publication of legitimately privileged communications would prejudice Noriega's defense were those protected conversations to fall into the hands of the prosecution.

Id., at 1051-52 (emphasis added). Thus, the significance of the attorney-client privilege is limited to a determination of whether the prosecution would be prohibited from obtaining the communications; and if so, whether the communications would have prejudiced the defendant's case if actually viewed by the prosecution. Even if a defendant could establish prejudice as a result of the prosecution gaining access to the conversations, a court would be required to explore less intrusive alternatives in order to avoid the prior restraint. *Id.* at 1054. ("Even if Noriega were able to meet his burden of establishing demonstrable prejudice upon the prosecution's gaining

access to these conversations, the court would in all likelihood refrain from imposing a prior restraint on the press.").[10]

Freedom of the press from prior restraints is the quintessential right under the First Amendment. However, the presumption against prior restraints must not eviscerate those rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments. A more sophisticated test is required in order to effectively address the complex constitutional concerns that may arise in any given criminal trial. The prerogative to change the prior restraint standards is the province of the United States Supreme Court. The majority makes a thoughtful and practical challenge to the current *Nebraska Press* test. I join the majority's plea for a change, but until the Supreme Court revises the current test, it binds us.

For the foregoing reasons, I respectfully dissent.

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[10] The court noted that other less drastic alternatives included sequestration of the prosecution and dismissing members of the prosecution team or excluding evidence and witnesses.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF GENERAL SESSIONS ELEVENTH JUDICIAL CIRCUIT
The State of South Carolina, vs. B.J. Quattlebaum, Defendant.	Indictment No.: 95-GS-32-0669 **EX PARTE TEMPORARY RESTRAINING ORDER** (Filed Aug. 18, 1997)

TO: THE ELEVENTH CIRCUIT SOLICITOR'S OFFICE THE LEXINGTON COUNTY SHERIFF'S DEPARTMENT WIS-TV:

This matter came before me on Application and Motion of the Defendant, by and through his counsel, Joseph M. McCulloch and Katherine E. Evatt, for an Ex Parte Order granting certain limited Temporary Restraining Relief pending a future hearing, in the nature of an Order prohibiting the dissemination by the participants, prosecution, law enforcement agencies, the defense, and the media from disseminating or otherwise characterizing or permitting in publication the substance and details of an apparently privileged conference between the accused and his counsel.

This Court's review of the affidavit attached to the Motion/Petition for Relief establishes the grave threat to Defendant's right to a fair judicial process. The United States Supreme Court in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), stated a "responsible press is the handmaiden of effective

judicial administration." Other cases have carefully considered the delicate balancing of the First Amendment rights of the public and press to be informed of matters of public interest juxtaposed against the constitutional protections afforded those accused of criminal offenses. The cases reviewed today, including *Cable News Network v. Noriega*, 498 U.S. 976, 112 L.Ed.2d 432, 111 S.Ct. 498 (1990), *US v. Noreiga*, 752 F.Supp. 1032 (S.D. Fla. 1990), *Nebraska Press Association v. Stuart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) and *Shepard v. Florida*, 341 U.S. 50, 95 L.Ed. 740 (1951), establish the necessity of this Court acting decisively, albeit in an Ex Parte fashion to issue a Temporary Order to protect the Defendant's rights and privileges.

THEREFORE, pending further scheduling of a hearing, it is hereby ordered that all participants, including prosecution, law enforcement, the defense, and all media be prohibited from disseminating the substance and details of the privileged communication between the Defendant and his counsel.

IT IS SO ORDERED.

/s/ Thomas Cooper
The Honorable Thomas Cooper
Circuit Court Judge

at 3:20 P.M. O'Clock on
this 18th day of August, 1997
Columbia, South Carolina

I SO MOVE:

/s/ Joseph M. McCulloch

/s/ Katherine E. Evatt

I CONSENT:

/s/ F. Humphries, Jr.
Deputy Solicitor
11th Circuit

STATE OF SOUTH CAROLINA	)	IN THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	COURT OF GENERAL SESSIONS
EX PARTE:	)	Indictment No: 95-GS-32-0669
The State-Record Company, Inc.	)	
IN RE:	)	TRANSCRIPT OF ORAL ORDER OF THE HONORABLE THOMAS W. COOPER, JR. CIRCUIT COURT JUDGE, ISSUED AUGUST 19, 1997
State of South Carolina,	)	
vs.	)	
B. J. Quattlebaum,	)	
Defendant.	)	

* * *

[p. 22] THE COURT: We talked about the Nebraska Press Association case and we need not belabor the facts of the case. The analysis Chief Justice Burgher came back to at the conclusion in that case acknowledges that it is an analysis involving the confrontation between prior restraint and posed to protect one vital Constitutional guarantee that is the Sixth Amendment right of a fair trial and the explicit command of another that the freedom to speak in the public shall not be abridged. That is the First Amendment right of freedom of press. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances. But

the barriers to prior restraint remain high. The presumption against its use continues intact. The Court went on to declare that the Order restraining publication of material involving incriminating statements in the confession of the Defendant in that case which had been made in a public forum, did not [p. 23] meet that standard and that those restraints were clearly invalid. The Noreago case reiterated the three prong test set out in Nebraska Press and – or actually followed Nebraska Press. The test which must be met before prior restraint is justified where restraint is sought to prevent disclosure of events and confidential trial strategy, criminal trails, is the same as that addressed in pre-trial – prejudicial pre-trial publicity. The Court must determine based on the content of the speech, number one, whether the nature and the extent of disclosure would impair the right to a fair trial. Number two, where a less drastic means exist which would mitigate the effects of disclosure. Number three, whether prior restraint would effectively prevent harm. Ultimately the Noreago case because the information sought to be restrained and disseminated during the litigation by CNN lost some of its impact because many of the issues raised there were mooted by the fact that CNN had acted less responsibly than the news media in this State has thus far acted. And in that particular case actually fought to prevent the Court from getting access to the material sought to be disclosed, and they disclosed it during the process of the litigation. It is significant, however, that during the Noreago case litigation the Court sequestered to the extent possible the entire prosecuting team that was prosecuting Noreago. A considerable effort [p. 24] given the nature of the prosecuting team in that most

complex and far reaching case. To avoid them being privy to any privileged conversation between Noreago and his counsel which would have given the prosecution in that case an unfair advantage because of pre-trial strategy being revealed. What we have in this case to a certain extent in the Noreago case, is a contest, if you can call it that, or a balancing between the First Amendment right and the Sixth Amendment right, throw in next a violation of the attorney/client privilege which prevents a lawyer from revealing information to bolster him and confidence by his client, the comments under the rule dealing with the confidentiality of information. So the fundamental principle in the client/lawyer relationship is the lawyer maintains confidentiality of information related to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to information that he might not want otherwise revealed according to the comments there. And so there is a broad range of accountability legal issues at work in this particular scenario. I want to add my commendations to WIS and to The State Newspaper for the restraints that they shown and the other news media, whoever they are, that have access to this tape. One of the problems in issuing the Order is that we didn't know who had access. And rather than [p. 25] take a chance on someone who had access to the tape escaping through the net, we threw out a broad – as broad a net as we possibly could. It obviously goes without saying that to discover this after the news media had run it would have been indeed a Noreago case, which would have rendered it moot. The object was to try to prevent it at least initially until we could do what we have done today. And they have shown

restraints thus far in refraining from disseminating the contents or from characterizing the contents by the privilege of communication (inaudible). That restraint was born, as I have said, (inaudible) out of this Court's temporary restraining order as it was the application of a highest journalistic principles in balancing the First Amendment against the Sixth Amendment rights. That balancing test was done by the news media itself. But the balancing test and the result of the news media reaching that incident would represent to this Court as it necessarily had to be, as the current position of the news media, subject to change if events at some point in time in the future cause the editorial policy to change, to address news concerns which might run at odds to the concerns of this Court regarding the Sixth Amendment protection. I take comfort from the news media's assurance that they don't plan to run this portion of the tape, that is the audio portion of the tape, nor do they plan to [p. 26] characterize the contents of it. But I realize that their concerns may be different ultimately from the concern of this Court. The Sixth Amendment right to a fair trial is an absolute right. And the attorney/client privilege is a critical element in the fair trial process. And that privilege has been invaded in this case. I would imagine if I cared to leave the relatively safe legal ground in which I feel some degree of comfort, although in this case I realize that may be a stretch, and wander over into the journalistic rounds that what is really news in this case is not so much the contents of that tape is as it is the fact that the tape exists at all. And that this Court has never sought to restrain or to impair dissemination of. But the fact that the privilege had been invaded in this case may by its very nature, the

very invasion alone, may have an impact on the Defendant's ability to get a fair trial. That determination obviously has yet to be made. The publication or the transmission of that privileged communication, or its characterization would make it much more unlikely that the Defendant could obtain a fair and impartial trial, given even all the protections that our system has in place to ensure a fair and impartial trial. And that's a risk that is too great to take, not only from the standpoint of the Defendant's concerns, he is literally on trial for his life, but also from the basic need to protect the integrity of the [p. 27] judicial process. Whether the need to ensure the public or individuals, the Defendant's or the victims of crimes, that the system is designed to work in an orderly manner according to rules. These are principles that have been handed down for generations and yet they ever change to meet the needs of society. But they are designed to ensure that the innocent will not be punished and that the guilty will not go free. And if those rules are violated as they have been in this case insofar as the intrusion or invasion into this privileged communication is concerned, and if that violation is not checked within strict bounds, then the assurance of the integrity of that process is lost, and the innocent may be punished or the guilty may go free. Now, the media is not responsible for the violation of the rules. And as I have said they have acted responsibly thus far in reporting the violation, which as I have indicated I feel is good news. And they indicated intentions to continue to act in that same responsible manner. But the restraint which is placed by this Court upon the media I feel is narrowly drawn.

Those restraints do not prohibit the reporting of the invasion of the attorney/client privilege; they don't restrain or prohibit the identify of the individuals involved or the nature of the charges in the case. They simply apply to the dissemination of the contents of the communication or the characterization of its contents. I [p. 28] feel that under the circumstances those are reasonable restraints to be implied – to be applied in this case. The communications themselves are a matter of under seal; the record is protected in that a Court of higher level can review those contents and compare them to the restraints applied in this case to determine whether or not this Court has overstepped its bounds and whether it has come down too heavily on the side of the Sixth Amendment at the expense of the First. This Court with great reluctance intrudes in any area of restraint for the press. I feel, however, that that intrusion has been required under these circumstances for the reasons that I have already said. The Motion therefore to dissolve the Temporary Restraining Order is denied. The limitations of the Restraining Order are to remain in effect until the jury in this case is empaneled and sequestered, at which time they will be lifted. Thank you, ladies and gentlemen.

* * *

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of General Sessions
Thomas W. Cooper, Jr., Circuit Court Judge
Case No. 95-GS-32-0669

Ex Parte:

The State-Record Co., Inc.,

Appellant,

In Re:

State of South Carolina,

vs.

B. J. Quattlebaum,

Respondent.

ORDER

Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.
s/ James E. Moore A.J.
s/ John H. Waller, Jr. A.J.
s/ E.C. Burnett, III A.J.

I would grant Rehearing.

s/ Jean H. Toal A.J.

September 25, 1998.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSION
COUNTY OF LEXINGTON	)	
Ex Parte: The State-Record Co. Inc.,	)	
In Re: The State of South Carolina,	)	Indictment No. 95-GS-32-0669
Plaintiff,	)	NOTICE OF MOTION AND MOTION
v.	)	
B. J. Quattlebaum,	)	(Filed Aug. 19, 1997)
Defendant,	)	

TO: DONALD V. MEYERS, ESQUIRE, SOLICITOR, ELEVENTH JUDICIAL CIRCUIT; JOSEPH M. MCCULLOUGH, JR., ESQUIRE; AND KATHERINE EVATT, ESQUIRE, ATTORNEYS FOR DEFENDANT:

PLEASE TAKE NOTICE that The State-Record Co., Inc., moves herewith for dissolution of the Ex Parte Temporary Restraining Order granted in the within-captioned case at 3:20 p.m. on August 18, 1997 on grounds that the order was improvidently issued in that the court lacked jurisdiction over The State-Record Co., Inc. and the order constituted an impermissible prior restraint under the

First and Fourteenth Amendments to the United States Constitution.

/s/ Jay Bender
Jay Bender
BAKER, BARWICK, RAVENEL & BENDER, L.L.P.
1730 Main St., Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for The State-Record Co., Inc.

Columbia, South Carolina

August 19, 1997

STATE OF SOUTH CAROLINA	)	IN THE ELEVENTH
	)	JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
State of South Carolina	)	
vs.	)	AFFIDAVIT OF
	)	JOSEPH M.
B.J. Quattlebaum.	)	McCULLOCH, JR.
Defendant.	)	
	)	(Filed Aug. 18, 1997)

Personally appeared before me Joseph M. McCulloch, Jr., who after being duly sworn, states and deposes the following:

1. The Affiant along with Kathy Evatt of the Public Defender's Office in Lexington County are the appointed counsel for the accused in the above captioned matter.

2. In the above captioned matter, the Affiant and co-counsel have earlier filed and demanded the State make discovery available to the defense in response to the motions for discovery and *Brady v. Maryland* materials. After repeated demands the defense was provided partial discovery on or about August 8, 1997 which included a video and audio tape which included communications between the accused and an attorney summoned by the Defendant to the Lexington County Sheriff's Department to give him certain advice during an investigative process. Upon review of that video and audio tape, and in conjunction with certain information provided by the Lexington County Sheriff's Department, it appears that this video and audio tape was made on the premises of the Lexington County Sheriff's Department without the

knowledge either of the accused or the then attorney participating in the conversations.

3. Without regard to explanations or the circumstances of the acquisition of this information, it appears to counsel for the accused that this information was obtained through surreptitious and unlawful means and without the knowledge or consent or approval of either of the participants to these privileged communications.

4. It further appears, based upon information received by counsel for the Defendant that these video and audio communications have now come into the possession of at least one news outlet. WIS Television, which at this time indicates an intention to televise certain portions of the video presentation, but at the present time, WIS Television indicates it's intention not to disseminate either the text or the substance of these communications to the extent they may be aware of the audio and contextual communications.

5. Based upon all of the above, counsel for the accused feel that there are no reasonable means to ensure or otherwise protect the accused from the prejudicial dissemination of the audio or contextual portions of this privileged communication which counsel believes was unlawfully obtained by the Lexington County Sheriff's Department and therefore makes the attached motions and seeks the assistance of the Court in ensuring the protection of the accused's constitutional rights under the

State and Federal Constitutions and statutory and case law of South Carolina.

/s/ Joseph M. McCulloch, Jr.
Joseph M. McCulloch, Jr.

/s/ Katherine Evatt

SWORN TO AND SUBSCRIBED BEFORE ME THIS 18th DAY OF August, 1997.

/s/ Elaine G. McLeod
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires Sept. 29, 2005

STATE OF SOUTH CAROLINA	IN THE ELEVENTH
COUNTY OF LEXINGTON	JUDICIAL CIRCUIT
	COURT OF
	GENERAL SESSIONS
EX PARTE:	
The State-Record Company, Inc.	Indictment No: 95-GS-32-0669
IN RE:	
State of South Carolina,	EXCERPT FROM TRANSCRIPT OF HEARING
vs.	
B. J. Quattlebaum,	
Defendant.	

Hearing held before the Honorable Thomas W. Cooper, Jr., Judge, commencing at the hour of 3:25 o'clock P.M., on Tuesday, August 19th, 1997, at the Richland County Judicial Center, Courtroom #2-B, 1701 Main Street, Columbia, South Carolina.

APPEARANCES: Jay Bender, Esquire, of the firm of Baker, Barwick, Ravenel & Bender, P.A., Attorneys for The State-Record Company, Inc.

Joseph M. McCulloch, Jr., Esquire, of the Law Offices of Joseph M. McCulloch, Jr.; and Kathy Evatt, Esquire, Office of the Public Defender for Lexington County, Attorneys for Defendant.

* * *

[p. 3] PROCEEDINGS:

THE COURT: Yesterday afternoon at 3:20 P.M., this Court upon Motion for Mr. McCulloch and Ms. Evatt, the attorneys for B. J. Quattlebaum, the Defendant in this action, with the consent of Mr. Fran Humphries on behalf of the Solicitor's Office of Lexington County, issued an Ex Parte Temporary Restraining Order prohibiting the dissemination by either the participants or prosecution law enforcement agencies, the defense and the media from disseminating or otherwise characterizing or permitting a publication of the substance and details of apparently privileged conference between the Defendant in this case and his attorney at the time. The record should reflect to be complete that prior to the issuance of that Ex Parte Order, I talked with Mr. Covington, the News Director of WIS, who had indicated to me that WIS's editorial policy at the time is not in any event to disseminate the information which this Court sought to restrain, that that was its present posture. He could not, of course, commit beyond that. But nonetheless, that was its present posture and before I signed the Ex Parte order I advised Mr. Covington of what I was signing. And he concurred that that was in accord with our conversation earlier in the day. The record should further reflect that I did try to contact Mr. Bender, who I know to represent the Press Association and The State [p. 4] Newspaper, to discuss with him the Order before I signed it. I wasn't able to do that; he was in Federal Court at the time. And he tried to call me back and I was at the Court Administration in new judges school, and he was unable to contact me through no fault of his own. He made gargantuan efforts in that regard without success. Subsequently Mr. Bender

on behalf of The State Newspaper filed a Notice of Motion and the Motion seeking the dissolution of the Ex Parte Temporary Restraining Order on the grounds that the Order was improperly issued because this Court lacked jurisdiction over The State-Record Company, Inc., and further that the Order constituted an inadmissible prior restraint under the First and Fourteenth Amendments to the Constitution. Mr. Bender, it's your Motion, I'll get to your first.

MR. BENDER: May it please the Court, and I appreciate your efforts yesterday to indicate to me prior to the issuance of the Order. And I also appreciate your holding an expedited hearing on the Motion today. I know this is not a new issue to you. We argued much the same Motion in Sumter maybe a year or so ago in a double murder case there which had received far more publicity in that smaller community than this case has received here. And at that time you ruled that the moving party, in that case also the Defendant, had failed to make the appropriate showing to [p. 5] require you to grant the imposition of a prior restraining on coverage of that case prior to trial. There are two problems to the attack by The State-Record Company here to the Ex Parte Order issued yesterday. And I have talked with Lewis Cromer, who represents WLTX, and he said that he would say what I say if he were here. I didn't know he was that eloquent, but that's what he said. I'm sure he would raise his argument to a high level and raise his fee, I'm sure. But to address the first point: There was no process issuing from the Court that brought before the Court yesterday, the State-Record Company or WLTX, or anyone else outside of the parties. And the Court can only act on those parties

before it. So, it would be the position of the State-Record Company that an Order issued without process – in a civil case, of course, it would be a Summons, here it would be perhaps a Rule to Show Cause in aid of this case. There is nothing to bring the parties before you for you to assert the jurisdiction of the Court. For that reason the Order with regard to The State-Record Company is null. Now, because the Newspaper respects the position of the Court there was no effort to disregard the Order, hence this Motion. So, to address the more fundamental underlying issue here, the First Amendment in its most narrow sense protects against impermissible prior restraint on the publication of information. There is an unbroken string of cases decided [p. 6] by the United States Supreme Court where the ruling has been to strike down prior restraint. And the thread running through all of those cases is that a prior restraint on publication is one of the least powerful infringements on the First Amendment. In the Nebraska Press Association versus Stewart case, the United States Supreme Court reiterated a view it had previously adopted in the decision of Austin versus Keith (phonetic). And it said that the request for prior restraint comes before the Court with a presumption against its Constitutional ruling. And Nebraska Press Association had a case where there had been a mass murder and sexual assault in an eight hundred person Nebraska community. There had been wide dissemination of information about the suspect, about the crime, and about an alleged confession. The Court, the Trial Court, entered an Order restraining the press from publishing any information about the case. That Order was also modified when it got to the United States Supreme

Court and the Supreme Court struck down that restraint on the press on grounds that there had been an inappropriate showing that justified the extraordinary remedy of prior restraints. Specifically, there had been no showing that the nature and extent of pre-trial publicity was such that it would irretrievably damage the Defendant's Sixth Amendment right to a fair trial. And in the case the Supreme Court discussed a number of pre- [p. 7] trial publicity cases that it had decided. And the Court said – "Even pervasive publicity does not inevitably lead to an unfair trial. The capacity of the jury eventually empaneled to decide the case fairly is influenced by the tone and extent of the publicity which in part and often in large part is shaped by what attorneys, police and other officials do to precipitate news coverage." And it points out that the Court has a major responsibility. And I know you appreciate that and understand it. What has been the nature of the pre-trial publicity in this case? Almost none. I hate to think that murder in our society is routine. But I think this is not a notorious murder case. This has not received nearly the amount of pre-trial publicity that other cases in your memory and experience have in Richland County, Lexington County, or any of the other adjoining counties. The second question is: There was no showing that there are alternative means that would provide the same protection or would be ineffective. And the traditional means to provide protection for a Defendant's fair trial right, of course a change of venue, a continuance, extensive voir dire. And the Supreme Court has reiterated this on three occasions, strong instructions to the jury that they are to decide the case on the basis what is heard in the courtroom. And we know that the issue of

an untainted jury is not a jury that has never heard of a case, but a jury that can set aside what it may [p. 8] have heard and what it may know, and decide the case on the basis of evidence presented at the trial. So there is no showing in the record that was presented to you yesterday that any of those methods would be unavailing. I thought the case was to be tried imminently. I am now learning that the case was not scheduled for trial until November. I would suspect that no matter what is in that tape and how that tape is characterized, if it were to be broadcast on every television station covering Lexington County and published in every newspaper that is read in Lexington County, and published and broadcast for a week, that by the time you picked a jury in November you would have no difficulty finding twelve jurors and three alternates who had never heard it or didn't remember it, because it's not important to them in their daily life. It touches someone because they have a connection with the victim or know something particular about it. They might remember it. But I think in the day to day life of most people who would be for jury service in Lexington County, whatever they have heard or read would not preclude them from serving. And then beyond that you would have to have a showing that the closure, the sealing of the tape, the prior restraint, is bound to be effective and is narrowly tailored to protect that Sixth Amendment interest of the Defendant. And I think that it is instructive that the United States Supreme Court [p. 9] in all the cases it's had with pervasive pre-trial publicity has never once sanctioned a prior restraint on pre-trial publicity. Now, in the Order yesterday there was a discussion of Noreago (phonetic), the CNN versus Noreago

case, I think that's an interesting case because it's a historical anomaly. It's never been filed. It was a Sixth Amendment case, was denied, never been reviewed, never been followed. So, I think that there is no way that an Eleventh Amendment decision in the Noreago case, premised in large part on jurisdictional grounds, can serve as justification to impose prior restraint in this case. So I think the issues are substantial. I think the showing is wholly inadequate. And I think to compound that by having the showing made – the Ex Parte suggests very strongly that this Order should be dissolved with regard to The State-Record Company and as Lewis Cromer requested for WLTX.

THE COURT: All right, thank you, Mr. Bender. I will allow Mr. McCulloch and Ms. Evatt to reply in a moment. The argument about dissemination of the material now leaving the minds of the Lexington County jurors before November, may have some merit if we cannot be assured that the dissemination was not rebroadcast the week before the trial, which is the standard that normally applied in cases like this. So I think that really when we are talking about dissemination from a trial standpoint, we can almost count [p. 10] on whatever is disseminated now being disseminated when we get to trial. That is simply the nature of news and we understand and appreciate that. The Noreago case, of course, hopefully has not been followed because hopefully no other circumstance has occurred wherein the news media sought to disseminate privileged communications between an attorney and his client, which is the subject of course of the matter here. The Nebraska Press case had to

do with the obviously improper prior restraint of a confession of a Defendant, which I think had been made and which the whole world had notice at the time, in an attempt to keep the jury panel untainted prior to the selection process. And finally, insofar as the fact that this Court did not have the authority to bind The State Newspaper at the time, granted. The fact that we did not have The State Newspaper before us at the time was a concern of this Court. I balanced that against the concern about the prior publication of its intrusion into the attorney/client privilege. Rule 65 of the South Carolina Rules of Civil Procedure states that every restraining Order shall set forth the reasons for restraint, to be specific in terms, shall describe in reasonable detail, and not by reference but – the act or acts sought to be restrained, and this is the operative portion for our arguments today, it's binding only upon the parties to the action – The State Newspaper [p. 11] was not a party to the action – their officers, agents, servants, employees and attorneys, none of those were involved. And upon those persons in active concert or participation with them to receive actual notice of the Order by personal service or otherwise. At the time of the hearing yesterday, which this Ex Parte Order was issued, no one who was present at the hearing knew how many people had received copies of this tape. WIS had advised its counsel that it had a copy of the tape. We were not interested, and frankly for our purposes here today we're still not interested in where they obtained a copy of that tape, we know where the tape was made and that's no secret. Obviously ultimately it had to come from – at least have its origin in that source, that initial source was a party to this action and was present. And I guess the

question arises as to whether or not the persons who ultimately received the tape were in active concert or participation with those folks who had originated it and to have distributed it. And that, of course, is a question we do not have the answer to, quite candidly. And I was aware of the fact at the time that there was a concern. What we had attempted to do in order to not intrude upon the rights of the press without giving them a chance to be heard on this was to serve copies of the Order upon them immediately. And yesterday at the time this Order was set or signed, a [p. 12] hearing was set for the next Wednesday at 9:00 P.M. to address these concerns that are being raised here today. Obviously the nature of the news media is such is that the news means what it says, it's new. And if it's not new, it's not news. Next Wednesday it might not be new; it might not be news. Therefore, the issues which we are dealing with today might even be irrelevant. So that's the reason we have agreed to the expedited hearing which we have here today. And having said those things, Mr. McCulloch, Ms. Evatt, I will be glad to hear from you all in response to the argument of Mr. Bender.

MR. MCCULLOCH: Your Honor, I was just thinking, I remember a quote of someone saying that news is history on the wing, and certainly it appears that news has flooded into our courtroom. We appeared before you yesterday. But prior to that have appeared before you, Your Honor, as you certainly know to report a theft of some Constitutional rights. It is said that these rights belong to Mr. Quattlebaum, but ultimately to all of us. The right to consult your counsel, to be confident in the privilege of that right, and the confidence of that right

has been invaded. This case is significant and your actions yesterday legally were appropriate, and we believe that this Order should be continued because this is not just a criminal case, it is a case involving the most serious [p. 13] invasion of Constitutional rights that I have seen, or have been able to find with the possible exception of CNN. The distinction between this case and CNN is that CNN involved the interception of attorney/client privilege conversations by a third party, not by law enforcement, not by the prosecution. This is the most serious violation of Constitutional rights and the most serious case that we have, most serious accusation that can made in South Carolina's courts with the prosecution and their announced contention of seeking the most serious – death. In all due respect to Mr. Bender, it is evident that I am not prepared to gamble Mr. Quattlebaum's life within a month, or two, or three we can pick a fair jury. We think that, Your Honor, that is not going to be possible, and it is obviously further jeopardized by these proceedings, but these proceedings are necessary. In that earlier view, the one before you yesterday, we presented to the Court certain information which is now under seal, Your Honor, which we presented to demonstrate that prejudice to our client began immediately at the time of this interception and it invaded and tainted the prosecution's investigation. We think that today to rescind this Order and permit the dissemination of this privileged conversation would only supplement and compound that prejudice and damage. And having reviewed Nebraska Press Association v. Stewart, which you know, Mr. [p. 14] Bender has the jump on me, he has read it a few more times than I. I studied it and I studied

the CNN and some other cases, CBS, Inc. versus Young, and some others. But, you know, there are some significant distinctions between this situation we have here and the Court's already made those observations, so you have saved me the time of emphasizing those observations. I think it is important to refer at least to Justice Brennan's (phonetic) observations and his concurrent opinion, and which you observed that you cannot sacrifice a Defendant's Sixth Amendment right at the altar of the First Amendment right of free press. That is unfortunately what we have. The Order that you issued yesterday, we believe was an act under exigent circumstances that are not only unusual but are novel. They are precedential based on all of my review at the Law School, which is my favorite hang out. I haven't been able to find a case that is peer or parallel to these circumstances. And because of that fact we felt that the unusual action referred to you in an Ex Parte setting was necessary under all those circumstances. We very much appreciated the responsible position that WIS took from the first instance of their revelation to us that it was not their intention to disseminate the content of the conversation but to disseminate only the video portion of the tape. We felt that the elements set forth in Nebraska, the Nebraska case, [p. 15] that the Court considered and issued an Order that was restrained and less restrictive than some other possible alternatives and options you could have imposed on the press. We felt that the restrain at least insofar as WIS-TV was concerned was almost consensual. But frankly, we felt that had it not been consensual or had it not been their determination not to air – to air the contents it still

would have not been appropriate and absolutely necessary under the inherent authority of the Court to protect this gentleman's rights to a fair trial, if that is possible today. Or three months from now, or ever. And we have some grave doubts about that. In the case of CNN, Mr. Bender refers to that case as a case that has never been followed for this very simple reason. The United States Supreme Court in its very short opinion refusing to stay the injunction, they observed, I think that this – that the CNN versus Noreago case, which is very much like our situation, it involved the interception of attorney/client privilege conversations that were discussions of trial strategy and would have been in that context very damaging to the ability of the defense to go forward, to represent their client, and impinge upon the potential for a fair trial. In that case the CNN's demand for a stay was based upon the lack of showing any prejudice to the Defendant. The Court, the Supreme Court affirmed that injunction and [p. 16] found that there really wasn't in that case the need to find prejudice. I want to emphasize, Your Honor, we think we have already demonstrated all that in a protective environment at the present time under seal. The prejudice has already emanated from the use of this information and that to now permit further dissemination of it could only be further damaging. The lower Court, District Court in the Noreago case, went on to recognize, or at least the lower Court recognized that that was a novel, a first time situation. It was so novel that they felt that that (inaudible) the invasion of the free press right and absolutely overcame the right of the press to be free from prior restraint. We feel that under these circumstances, this certainly is not a precedent –

adversely to the press. We think it is without peer and therefore we believe your actions were appropriate. The only observation, Your Honor, that – the only shortcoming, I should say, with respect to the Order that we – and I presented and requested issued, is that it is, I think, limited in the scope of its impact on the First Amendment. And I think therefore, appropriate. I think it was measured, I think it was the least restrictive alternative. I cannot conceive of any other means to accurately protect the rights of Mr. Quattlebaum or anyone – any other person whose attorney/client privilege has been invaded in this fashion. I guess the only concern that [p. 17] perhaps the Court should consider a terminational date or some other limitation upon the duration of that. And in that regard, of course, Your Honor, one of the sticking points in the Nebraska case was of course that the Order precluded the publication and dissemination of events that occurred within the public courtroom. We have never, Your Honor, asked you to bar the reporters from this courtroom, to gag them from reporting these events today; although I have some concern about the effect of that in the public environment, and the effect that will have on Mr. Quattlebaum's ability to have a fair trial. But in that Nebraska case the Court's injunctive Order, I think, terminated at the point at which a jury had been impaneled and presumably was to be sequestered from the potential for harm. I would suggest to the Court that perhaps the Order should be simply amended to include something on that order so that it is therefore limited in scope in terms of its restriction upon dissemination and that it continue to be imposed upon all the parties included, media, WIS, and The State Newspaper, and

generally the press and parties that Mr. Bender I presume represents through the Press Association. But that it terminate at some time following the impaneling of the jury if that ever occurs in this case. Your Honor, I guess other than that, I will say to the – that I think your actions are appropriate, that you have jurisdiction to act, that under [p. 18] (inaudible) analysis you are required to consider the gravity of the evil that may arise, that may result from the evil that is represented to you, and the evil that is represented here. And I think you already outlined it. There are other issues, Your Honor, that in the coming days and weeks we will be asking you to investigate. And I think those are going to be absolutely necessary. But I cannot think of any less restrictive means, I cannot think of any way – any less restrictive method to protect Mr. Quattlebaum's rights. And we will continue to fight to allow the public to know of their processes, the procedures of the criminal justice procedure. And we have serious concerns and hope the public will take note of the procedural event that we will be discussing because these are their rights. And we in no way wish to restrict the public from understanding that there has been serious prosecutorial misconduct here. And we hope that through the Court we will be able to get to the bottom of how those things occurred and when they began to occur, and what the effects of those have been on all of us. Thank you, sir.

THE COURT: Thank you, Mr. McCulloch. Mr. Bender, your response.

MR. BENDER: May it please the Court. We are speaking here in very basic tones, of course, and we are talking about balancing rights. There was no evidence

[p. 19] presented to you yesterday, there has been no evidence presented to you today that there is any likelihood of publication of any information. The only evidence you have is that the one person who had access to the information told you it would not be published. So on the basis of that, you have issued an Ex Parte Order which imposes a prior restraint on every news entity in South Carolina without them having once been before you. And you are being asked by the Defendant here to conclude that using the time honored remedies available to you, you cannot impanel a jury to give this Defendant a fair trial based on the contents of that tape. I think that's a leap of faith that you cannot make. A leap of faith that is impermissible because your decision has to be based on evidence and you have no evidence. There is a continuance, and I think you are right that in all likelihood if the information is published, and I don't know anybody who intends to publish it, if it's published now it's likely to be repeated at the time of trial because that's when people are interested in that particular trial. Change of venue? I think we can find a profile of jurors that matches the profile of Lexington County. You can go to Pickens County or to Oconee County and select a jury. Yeah, that's an expense, but that's an expense of the State in recognition that there are some rights in our society that are not to be discarded, [p. 20] fundamentally the right to a fair trial and the right to a free press. So we look for ways around the imposition of a prior restraint. The extensive voir dire. If Oliver North can be tried before twelve people in Washington, D.C., who never heard about him or never heard a thing about the Iran Contra Affair, I suspect in Lexington County from all the

people who have driver's licenses, all the people who are registered to vote, you can find twelve people who will not have heard of this, and you can make certain of that by expanding voir dire. And I know that if you impanel those twelve people in Lexington County and you tell them that it's their solemn duty to decide the case on the basis of what is presented in Court and nothing else, that that will happen. And there is no evidence that has been presented to you either in the Ex Parte proceeding yesterday or today by the party that bears the burden of justifying a prior restraint, namely the Defendant, that any of these measures that have been sanctioned by the United States Supreme Court would not be effective. And it's supposition to say that what's in here will so damage the rights of this Defendant that none of these other alternatives that do not intrude upon First Amendment rights would correct it. And I think you can't make that conclusion from your experience, and you certainly can't make it on the showing that's been presented to you either yesterday or today. And I think that the Order [p. 21] should be dissolved because it has long been the rule in our country that the decision on the editorial content of our newspapers and our magazines, and the broadcast content of our radio and television stations, is an editorial decision that is left to the professionals, left to the editors. And I think Randy Covington's statement to you yesterday that it was not his station's intention to broadcast what he recognized as a privileged communication. It is probably the norm. It's a responsible decision made by people who deal with responsible issues every day. I suspect that everyone who has access to this information – I don't know how it got out, I don't where it has gone –

but I suspect that they will all approach it from the same perspective. And to be blunt about it, that's where the decision making process is vested, on what goes into our newspapers. The Supreme Court in Nebraska Press Association pointed out that those societies that have allowed the courts and the government to control what goes in the press have paid the price for that. And that's a price our society has been unwilling to pay since the Bill of Rights was passed and adopted in what, 1787? So I would urge you to on the basis of the showing made yesterday and today to conclude that there are alternatives available to protect the Sixth Amendment right of the Defendant. And they might be a little inconvenient, but they are far less inconvenient to [p. 22] the citizens than the imposition on a prior restraint of information that is secured to them by the Constitution.

Thank you.

THE COURT: Thank you, Mr. Bender.

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